Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1998

SANDRA MORTHAM, SECRETARY OF STATE, AND THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, CHARLES STEWART, DOROTHY ROBERTS, BARBARA KING, PEARLIE WILLIAMS, LOUVENIA JONES, ROSA HENDERSON, DELORES COLSTON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a plaintiff claiming that he was not promoted, or not hired, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* can be required to show as part of the prima facie case that he is equally or more qualified than the successful applicant under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973)?

In a Title VII race discrimination case based upon the alleged failure to promote, or to hire, is the employer required to present testimony from the decision-maker in order to meet its burden of articulating some legitimate, nondiscriminatory reason for the employer's decision under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) framework and in the absence of presenting such testimony is the plaintiff entitled to a judgment against the employer for discrimination?

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Sandra B. Mortham, as Secretary of State of the State of Florida and the State of Florida, petitions for a writ of certiorari to the United States Supreme Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals (App. A., *infra*, 1a-56a) was issued on October 28, 1998 and is reported at 158 F.3d 1177 (11th Cir. 1998). The opinion of the United States District Court for the Northern District of Florida (App. B, *infra*, 57a-86a) was issued on May 19, 1995. The Order denying Petitioners' Suggestion of Rehearing (or Hearing) En Banc (App. C, *infra* 87a-88a) was issued on December 31, 1998. This Court has jurisdiction pursuant to Rules 10(a) and 10(c) of the Supreme Court Rules.

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is involved in this petition and is contained in Appendix D, *infra* 89a. This provision states that:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national original;

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)(2).

STATEMENT OF THE CASE

In 1979, this litigation was commenced as a class action lawsuit in the District Court for the Northern District of Florida ("District Court") by ten plaintiffs and a nonprofit corporation, Increased Minority Participation by Affirmative Change Today of Northwest Florida, Inc., (a nonprofit corporation) (collectively "Respondents"), against the State of Florida and George Firestone, in his capacity as Secretary of State (collectively "Petitioners"),[1] alleging racial discrimination against Respondents in hiring and promotions in violation of 42 U.S.C.

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[1] Sandra Mortham is the current Secretary of the State and was substituted for Firestone's successor, Jim Smith.

§§ 1981, 1983 and Title VII.[2] (R1-1).[3] Plaintiffs[4] sought equitable relief, including injunctive relief, back and front pay, and attorney's fees and costs.

On November 7, 1980, the District Court certified the litigation as a class action consisting of all past, present and future black persons employed by the Florida Department of State and all past, present and future black applicants for employment with the Florida Department of State. (R3-148). The District Court decertified the class approximately five years later, on September 17, 1984, because the record disclosed that the representative was not financially able to continue class representation. (R14-553). On December 17, 1985, Plaintiffs attempted to recertify the class (R15-593), but their request was denied on January 22, 1986. (R15-603). The case then proceeded to trial only on the claims of racial discrimination under the theories of disparate treatment and disparate impact.

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[2] The court of appeals has concluded that only the Title VII claim remains in this case.

[3] Record references refer to the record before the court of appeals. The cite refers to the type of record, volume number, document number, and page number.

[4] The term "plaintiffs" refers to all plaintiffs that claimed discrimination in employment decisions, other than Gracie Holton (whose claim is no longer an issue) and the claims by Increase Minority Participation by Affirmative Change Today of North West Florida, Inc., which was dismissed for lack of standing by the District Court.

A bench trial took place on April 1, 1986. At trial, Petitioners presented six days of testimony that showed the individuals selected for the positions at issue were more qualified than the Plaintiffs. *Increase Minority Participation by Affirmative Change Today of Northwest Florida, Inc., (IMPACT) v. Firestone*, 893 F.2d 1189, 1199 (11th Cir. 1990) (Edmondson, J., concurring in part, dissenting in part), *cert. denied*, 498 U.S. 847 (1990) (referred to as *IMPACT I*) (R21-799.) The Petitioners supplied applications and personnel cards in support of their position that the person thought to be the most highly qualified was hired. *Id.* With regard to other positions, Petitioners offered testimony to show why the particular plaintiff was considered less qualified. *Id.* The District Court concluded that the Petitioners "more than sufficiently sustained its light burden of articulation with regard to each position" sought. (R17-664-7). At the close of Plaintiffs' case, the District Court dismissed the disparate impact claims. (R40-5). The District Court did not rule on Petitioners' motion for involuntary dismissal, which was premised on the argument that the Plaintiffs failed to prove a prima facie case. (R40-7).

On August 11, 1986 the District Court issued its findings of fact and conclusions of law and rendered judgment in favor of Petitioners. (R17-664). The District Court in analyzing Plaintiffs' claims under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981) framework concluded, although without deciding, that Plaintiffs made out a prima facie case. (R17-664-6). In citing to *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824, the District Court held that the elements to establish a prima facie case requires evidence that: 1) the plaintiff belongs to a racial minority; 2) the plaintiff applied for, and was qualified for, a job

for which the employer was seeking applicants; 3) the plaintiff was rejected despite being qualified, and 4) after the plaintiff was rejected the position remained open and the employer continued to seek applicants with plaintiff's qualifications. *Id.*

In determining whether plaintiffs met their burden of establishing that the reasons submitted by Petitioners were merely a pretext for discrimination, the District Court concluded that Plaintiffs failed to show that the Petitioners' legitimate, non-discriminatory reasons were a pretext for racial discrimination. (R17-664-8.) In analyzing each claim, the District Court held that Plaintiffs did not sustain their burden of establishing that the selectee had qualifications equal to or less than those of the particular plaintiff, or other evidence demonstrating pretext. *Id.* at p. 15.

Plaintiffs appealed to the Eleventh Circuit Court of Appeals contending that the District Court erred by 1) determining that Petitioners met their burden of articulating a legitimate, non-discriminatory reason for the employment decisions when the trial court assumed that a prima facie case was made; 2) not making a specific finding that a prima facie case was made based on the expert testimony offered by Plaintiffs; 3) eliminating testing evidence from the scope of discovery; 3) dismissing plaintiff Gracie Holton's claims; and 4) decertifying the class and denying the motion to recertify the class. *IMPACT I*, 893 F.2d 1189. The Eleventh Circuit reversed in part and remanded for further determinations. *Id.* at 1197. The Eleventh Circuit held that the Petitioners did not meet their burden under the *Burdine* analysis because they did not offer proof by any person who made the employment decision or by any other person stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person.

Id. at 1194. The case was remanded for the District Court to determine whether a prima facie case was made by any of the Plaintiffs on their claims. *Id.* at 1194-95.

On remand, the District Court again reviewed the 67 positions at issue, the qualifications of the successful selectee and the qualifications of the Plaintiffs with respect to the positions sought. *Id.* at pp. 5-27. The District Court, in citing to *McDonnell Douglas*, held that in order to establish a prima facie case, the plaintiff must prove by a preponderance of the evidence "(1) that he is a member of a protected class; (2) that the adverse action was taken against him, e.g. discharge, demotion, failure to hire, or failure to promote; (3) that a person not a member of the protected class with equal or lesser qualifications received the position; and (4) that he applied for and was qualified for the position." (R22-899-4.) In all cases, the Plaintiffs proved the first element and, except in a few instances, they showed that they were qualified for their respective positions. *Id.* The District Court, focusing on the second and third prongs of the prima facie case, held that none of the Plaintiffs satisfied their burden of establishing a prima facie case. *Id.* at p. 31.

On appeal to the Eleventh Circuit Court of Appeals, the Plaintiffs argued that the District Court used the wrong legal standard by requiring them to prove that a person not a member of the protected class with "equal or lesser qualifications" received the job. Plaintiffs further claimed that the District Court erred by refusing to allow the Plaintiffs to pursue their claims concerning employment tests, and in refusing to recertify the class. The Eleventh Circuit issued its opinion on October 28, 1998 wherein it held that the District Court misapplied the law when evaluating the prima facie strength of the Plaintiffs' claims. *Walker v. Mortham*, 158 F.3d 1177 (11th Cir. 1998) (referred to

as *IMPACT II*) (App.A *infra.*) The Eleventh Circuit concluded that the District Court erred when it required each plaintiff to prove that he or she was equally or more qualified than the successful applicant for each employment position in question, and that the District Court erred when it required the plaintiffs to identify the successful applicants for the position by name. *Id.* at p. 30. The court's holding is that in all disparate treatment discrimination cases where the failure to promote or hire is at issue, the only method for the plaintiff to establish a prima facie case is for the plaintiff to show that: 1) he is a member of a protected group under Title VII; 2) he sought and was qualified for the position; 3) despite the plaintiff's qualifications the plaintiff was rejected; and 4) after the plaintiff's rejection, the employer either continued to attempt to fill the position, or filled the position with a person outside of the plaintiff's protected class. *Id.* at p. 16-17. The Eleventh Circuit further held that "although the Court in *McDonnell Douglas* noted that it may be necessary to alter the requirements of the prima facie case somewhat to respond to unique fact patterns, *see McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S. Ct. at 1824 n.13, we believe that *it is generally unwise to fragment the applicable legal standards in this area*." *Id.* at p. 15 (emphasis added). The Eleventh Circuit also found error by the District Court in requiring the plaintiffs to identify the successful applicants by name because under the *McDonnell Douglas* prima facie framework, a plaintiff is only required to establish that the successful applicant is not within her protected class. *Id.* at p. 30.

Upon review of the Plaintiffs' claims under the adopted method for establishing a prima face case, the Eleventh Circuit held that some of the claims passed muster, and these claims were remanded to the District Court to make a credibility finding on the evidence. *Id.* The court in *IMPACT II* also held that if the

District Court on remand determines that the Plaintiffs' evidence is credible in establishing the elements of a prima facie case, then the District Court must enter judgment in favor of the particular plaintiff on that claim. *Id.* at n. 31. For other claims, the Eleventh Circuit affirmed the judgment of the District Court for the Petitioners on the basis that the Plaintiffs failed to present evidence sufficient to support a prima facie case. *Id.* at pp. 34-36. The issue of recertification was left open upon remand. *Id.* at p. 37.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH BOTH SUPREME COURT PRECEDENT AND OTHER CIRCUIT COURTS OF APPEAL FOR THE ESTABLISHMENT OF A PRIMA FACIE CASE UNDER THE *MCDONNELL DOUGLAS* BURDEN SHIFTING FRAMEWORK

A. The Eleventh Circuit Opinion Conflicts with Supreme Court Precedent by Requiring that in a Promotion or Hiring Case The Relative Qualifications Between the Plaintiff and the Successful Applicant Can Never Be an Element of the Prima Facie Case

The Eleventh Circuit's opinion in *IMPACT II* rejected the numerous decisions in the Supreme Court as well as the Eleventh Circuit, which hold that a plaintiff may be required as part of the prima facie case to prove that he or she was as qualified, or more qualified, than the successful applicant. The Eleventh Circuit also rejected this Court's axiom that the prima facie case is a

flexible, and not a mechanical or rigid formula. The petition for writ of certiorari should be granted on this basis alone.

The criteria adopted by the Eleventh Circuit was contained in the former Fifth Circuit's opinion in *Crawford v. Western Electric Co.*, 614 F.2d 1300 (5th Cir. 1980) wherein the court held that in order to show a prima facie case of racial discrimination, the plaintiff must only show that: he is a member of a protected group; he sought and was qualified for the position that the defendant was attempting to fill; despite his qualifications he was rejected; and that after this rejection, defendant either continued to attempt to fill the position or filled the position with a white employee. *Id.* at 1315.[5]

Importantly, the decision in *IMPACT II* results in a conflict with previous Supreme Court precedent. *See McDonnell*

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[5] By adopting *Crawford* for the prima facie case elements in every promotion or hire case, the Eleventh Circuit implicitly overruled the more recent line of Eleventh Circuit case law which expressly provides that in order to establish a prima facie case for a failure to promote, a plaintiff must show, among other factors, that he was equal to or more qualified than the successful applicant. *E.g., Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642-44 (11th Cir. 1998); *Combs v. Plantations Patterns*, 106 F.3d 1519, n. 11 (11th Cir. 1997); *Batey v. Stone,* 24 F.3d 1330, 1333-34 (11th Cir. 1994); *Hill v. Seaboard Coast Line Ry. Co.*, 885 F.2d 804, 808 (11th Cir. 1989); *Wu v. Thomas*, 847 F.2d 1480, 1483-84 (11th Cir. 1988); *Perryman v. Johnson Prods. Co,* 698 F.2d 1138, 1142(11th Cir. 1983); *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 773 (11th Cir. 1982).

Douglas, 411 U.S. 792, 93 S. Ct. 1817; *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), and *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307 (1996). The Eleventh Circuit even expressly acknowledged that it was rejecting the principle that the *McDonnell Douglas* prima facie case model may be altered to the facts of the case: "[A]lthough the Court in *McDonnell Douglas* noted that it may be necessary to alter the requirements of the prima facie case somewhat to respond to unique fact patterns, *see McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S. Ct. at 1824 n.13, we believe that it is *generally unwise to fragment the applicable legal standards in this area*." *IMPACT II,* 158 F.3d at 1185 (emphasis added).

In *McDonnell Douglas*, 411 U.S. 792, 93 S. Ct. 1817, the Supreme Court established an allocation of the burden of production and an order for the presentation of proof in Title VII discrimination cases. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S. Ct. 2742, 2746 (1993). The Supreme Court in *McDonnell Douglas*, held that a plaintiff *may* establish a prima facie case by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open *and the employer continued to seek applicants from persons of complainant's qualifications*." *Id.* at 802, 93 S. Ct. at 1824 (emphasis added). Once the plaintiff meets this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employer's decision. *Id.* When the plaintiff and the employer satisfy their burdens, the plaintiff must show that the employer's reasons are a pretext. *Id.* at 804, 93 S. Ct. at 1825. At all times, the plaintiff retains the burden of persuasion and must

persuade the court that he is the victim of intentional discrimination. *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095. The purpose of the prima facie case is to create a rebuttable legal presumption of discrimination. However, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination in order to establish a "legally mandatory, rebuttable presumption.'" *O'Connor*, 517 U.S. at 311-12, 116 S. Ct. at 1310.

By holding that the prima facie standard can never include the relative qualifications as a necessary element, this Court's opinion runs contrary to *McDonnell Douglas*, 411 U.S. 792, 93 S. Ct. 1817 and case law applying the *McDonnell Douglas* criteria. For instance, in *Burdine,* the Supreme Court cited to the *McDonnell Douglas* prima facie case model in holding that the plaintiff had established a prima facie case by showing that she was qualified, she sought an available position, the position was left open for several months before she was rejected in favor of a male and that the successful male applicant had been under her supervision - in other words, the male did not have the plaintiff's qualifications. 450 U.S. at n. 6. *Accord O'Connor,* 517 U.S. at 310, 116 S. Ct. at 1309 (reiterating the *McDonnell Douglas* prima facie case standard); *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 986, 108 S. Ct. 2777, 2784 (1988) (holding a prima facie case under *Burdine* is established by showing that the employer "continued to seek applicants with qualifications similar to the plaintiff's").

The Eleventh Circuit incorrectly disregards this Court's *McDonnell Douglas* and *O'Connor* decisions, and instead opts to apply its own mechanical formula for every single promotional or hiring case. In *McDonnell Douglas*, and in subsequent Supreme Court decisions, the Court has made it quite clear that

the prima facie case may be altered to adjust to different factual situations for the particular case at hand. *McDonnell Douglas*, 411 U.S. at n. 13, 93 S. Ct. at n. 13; *Burdine*, 450 U.S. at n.6, 101 S. Ct. at n. 6 (the prima facie standard is "not inflexible" and the facts will vary in Title VII cases); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (prima facie case is not rigid, or ritualistic; rather it is a sensible way to evaluate the question of discrimination); *O'Connor*, 517 U.S. at 310, 116 S. Ct. at 1308; *United States Postal Service Bd. Of Governors, v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482 (1983) (the prima facie case method set forth in *McDonnell Douglas* was not intended to "be rigid, mechanized, or ritualistic"). In fact, the prima facie case method is merely a "`sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" *Id.* (quoting *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 2949 (1978)).

Applying these principles, this Court in *O'Connor*, rejected the formalistic prima facie standard for an age discrimination claim used by the Fourth Circuit Court of Appeals, which required the plaintiff to establish that following his discharge, or demotion, the plaintiff was replaced by someone of comparable qualifications outside the protected class. *Id.* at 310. Since the plaintiff's replacement was 40 years old - and therefore not outside of the protected class - the Fourth Circuit concluded that this element of the prima facie case was not satisfied. *Id.* This Court, in rejecting the Fourth Circuit's prima facie standard, held that the element of replacement by someone under 40 does not show a logical connection between each element of the prima facie case and the illegal discrimination. *Id.* at 312, 116 S. Ct. at 1310.

Similarly, the Eleventh Circuit has erred by adopting the formalistic method of establishing a prima facie case in the promotion or hiring context without considering that comparable qualifications in a particular case would show a more logical connection to an inference of discrimination than the elements adopted by the Eleventh Circuit. In fact, using the prima facie elements adopted in the *IMPACT II* decision would not necessarily suffice in all circumstances. For example, if the employer has a predominantly Black work force, the rejection of a Black applicant would not necessarily rise to an inference of discrimination. Thus, applying clear Supreme Court precedent, the *IMPACT II* court erred by not allowing for the flexible burden shifting standard mandated by this Court in *McDonnell Douglas, Burdine* and *O'Connor.*

The Eleventh Circuit also misread this Court's decision in *Patterson v. McClean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1988) as support for its conclusion that a plaintiff can never be required to show that the plaintiff was equally or more qualified than the successful applicant at the prima facie stage of the *McDonnell Douglas* analysis. *IMPACT II,* 158 F.3d at 1192. The decision in *Patterson* holds that a plaintiff must never be required to present any specific type of evidence to show pretext under the *McDonnell Douglas* model. 491 U.S. at 187, 109 S. Ct. at 2379. This Court's decision in *Patterson* does not stand for the proposition that proof of qualifications is always an incorrect factor of proof in the prima facie stage of the analysis.

The Eleventh Circuit opinion also unnecessarily lessens the prima facie burden in many cases by dispelling the rationale that the purpose of the prima facie case is to eliminate the most common nondiscriminatory reasons for the plaintiff's rejection. *Burdine*, 450 U.S. at 254, 101 S. Ct. 1094. In almost every

single case applying the Eleventh Circuit standard, the plaintiff can, and will, meet the prima facie case elements by simply showing that the plaintiff is in a protected group, applied for position, was qualified for the job for which the employer was seeking applicants; that the plaintiff was rejected; and that after the plaintiff's rejection, the employer either continued to seek applicants or filled the position with persons outside of plaintiff's protected class. In fact, the Eleventh Circuit even held that the plaintiff need not identify the successful applicant and need only show that the successful applicant is not in her protected class. *IMPACT II*, 158 F.3d at 1193. This standard substantially decreases the plaintiff's burden of production, which is to establish "`a legally mandatory, rebuttable presumption'" of intentional discrimination. *See O'Connor*, 517 U.S. at 311-12, 116 S. Ct. at 1310 (quoting *Burdine*, 450 U.S. at 254, n. 7, 101 S. Ct. at 1094, n. 7). The purpose of a prima facie case is to support a reasonable inference of discrimination; however, by creating a formalistic and extremely light burden of production for all cases of discrimination, the *IMPACT II* decision dispels with this goal.

In sum, the Eleventh Circuit has disregarded the prima facie elements set forth in *McDonnell Douglas*, as well as the admonition that the prima facie criteria are to be adjusted based upon the different factual situations before the court. *See O'Connor*, 517 U.S. at 312, 116 S. Ct. at 1310; *Aikens*, 460 U.S. at 715, 103 S. Ct. at 1482; *Burdine*, 450 U.S. at n. 6, 101 S. Ct. at n. 6. The Eleventh Circuit has improperly created a bright line formula for every Title VII promotion or hire case, which conflicts with established Supreme Court precedent and supports the granting of this petition for certiorari.

B. The Eleventh Circuit's Opinion Is in Conflict with Other United States Courts of Appeal Decisions on Whether as Part of the Prima Facie Case the Plaintiff May Be Required to Show That the Plaintiff Was as Qualified, or More Qualified, than the Successful Applicant

The Eleventh Circuit opinion in *IMPACT II* conflicts with case law from other circuit courts of appeal, which hold that comparable qualifications is a proper element for the prima facie case elements. *E.g., Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 327-28 (1st Cir. 1996); *Carney v. Textron Auto. Co.*, 1998 WL 598722 (6th Cir. 1998); *Pafford v. Herman*, 148 F.3d 658 (7th Cir. 1998); *McCullough v. Real Foods, Inc.*, 140 F.3d 1124 (8th Cir. 1998); *Cordova v. State Farm Ins. Co.*, 124 F.3d 1145 (9th Cir. 1997). Thus, this Court's guidance is needed with regard to the proper standard to be applied for Title VII discrimination claims based upon the failure to promote, or to hire.

In *Lehman*, the First Circuit held that the proper criteria for the alleged discriminatory failure to promote based upon the plaintiff's age required the plaintiff to show by a preponderance of the evidence that the employer sought to fill the position by hiring a younger individual with qualifications similar to those of the plaintiff. *Lehman*, 74 F.3d at 327-28. Similarly, the Sixth Circuit has held, in failure to promote context, that the fourth prong of the prima facie case requires the plaintiff to show "that the position was filled by a person *of comparable (or lesser) qualifications*." *Carney v. Textron Auto. Co.*, 165 F.3d 26, 1998 WL 598722 at *3 (6th Cir., Aug. 27, 1998) (emphasis added) (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824); *Richmond v. Johnson*, 134 F.3d 372, 1997 WL 809962 at *2 (6th Cir., Dec. 18, 1997) (the fourth prong of the prima face case

requires the plaintiff to show that another employee with similar qualifications, who was not a member of the protected group, received the promotion).

The Fourth, Seventh, Eighth and Ninth Circuits are also in accordance with the First and Sixth Circuits by requiring plaintiffs to produce evidence of comparable qualifications at the prima facie case phase of the *McDonnell Douglas* analysis. For example, the Fourth Circuit holds that to establish a prima facie case for discriminatory discharge under the Age Discrimination in Employment Act the plaintiff must show, among other factors, that following the plaintiff's discharge the plaintiff was replaced by someone with comparable qualifications outside of the protected class. *Causey v. Balog*, 162 F.3d 795, 802 (4th Cir. 1998). In *Wade v. Norfolk Southern Corp.*, 121 F.3d 702, 1997 WL 526018 (4th Cir. 1997) the Fourth Circuit held that to establish a prima facie case of discrimination for failure to promote the plaintiff must show that she was denied promotion under circumstances which created an inference of unlawful discrimination. *Id.* at *3. The Fourth Circuit recognized that since the employer is allowed to choose among equally qualified candidates, the burden is on the plaintiff to show "she was more qualified than those chosen for the position." *Id.* Given that the employer chose the better qualified candidates (and that the plaintiff failed to show she was qualified for the positions), the court concluded that there was no inference of discrimination to support a prima facie case. *Id.*

In *Pafford v. Herman*, 148 F.3d 658, 669 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 548 (1998), the Seventh Circuit held one of the elements that the plaintiff must show to demonstrate a prima facie case for a failure to promote claim is that "those who were promoted had similar or lesser qualifications for the

position, or other evidence from which one can infer that the plaintiff was denied promotion for a discriminatory reason". *Id.* at 670. The court in *Pafford* held that the plaintiff failed to establish a prima facie case as she did not establish that she was qualified and that she was "as qualified or more qualified than the four Caucasian employees who were promoted." *Id.* Similarly, the Eighth Circuit holds that comparable qualifications is a proper element for the prima facie proof in a failure to promote context. *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1126 -27 (8th Cir. 1998) (fourth prong of prima facie requires plaintiff to demonstrate "her employer promoted a person of similar qualifications who was not a member of the protected group"); *accord Lyoch v. Anheuser-Busch Companies, Inc.*, 139 F.3d 612 (8th Cir. 1998) (same). Finally, the Ninth Circuit holds that to establish a prima facie case the plaintiff, as part of the prima facie, case must show that "after her rejection, the position remained open and the employer continued to seek applications from persons with comparable qualifications." *Cordova v. State Farm Ins. Companies,* 124 F.3d 1145, 1148 (9th Cir. 1997); *see Tarin v. County of Los Angeles*, 123 F.3d 1259, n. 3 (9th Cir. 1997).

The Eleventh Circuit's decision in *IMPACT II* conflicts with the First, Fourth, Sixth, Seventh, Eighth and Ninth Circuits by holding that to create a prima facie case of discrimination based upon the failure to promote or to hire, the court may never require the plaintiff to show that he was equally or more qualified than the successful applicant. It is important for this Court to resolve this conflict as the Eleventh Circuit has created a lighter burden for plaintiffs in meeting the prima facie case requirements of the *McDonnell Douglas* framework, while other circuit courts of appeal have followed the line of authorities from *McDonnell Douglas*, which hold that comparable qualifications may, if

logically connected to the claim of discrimination, be an element that the plaintiff must satisfy at the prima facie stage in a Title VII case. This clear conflict among the circuit courts of appeal, provides sufficient basis for the granting of this Petition for Certiorari.

II. THE ELEVENTH CIRCUIT'S REQUIREMENT THAT THE EMPLOYER MUST PRESENT EVIDENCE FROM THE DECISION-MAKER IN ORDER TO SATISFY ITS BURDEN OF PRODUCTION AND THAT IN THE ABSENCE OF THIS TESTIMONY, JUDGMENT MUST BE ENTERED IN FAVOR OF THE PLAINTIFF UPON THE ESTABLISHMENT OF A PRIMA FACIE CASE, MISAPPLIES THE EMPLOYER'S BURDEN.

The burden of persuasion at all times remains with the plaintiff in a Title VII discrimination case. *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095. The defendant is only required to simply explain what he has done or to produce evidence of a legitimate nondiscriminatory reason. *Id.* (citation omitted). In *Burdine*, this Court reversed the Fifth Circuit on the basis that by requiring the defendant to provide evidence in order to meet its burden of production that those hired were better qualified than the plaintiff, was to improperly place the burden of persuasion on the defendant. *Id.* at 257, 101 S. Ct. at 1095-96. Similar to *Burdine*, the *IMPACT I* and *II* decisions also have misplaced the burden of persuasion on the employer.

In this case, the Eleventh Circuit has misconstrued the *McDonnell Douglas* burden shifting framework by requiring the employer to submit a specific type of evidence in order to rebut the plaintiffs' prima facie case. In other words, the Eleventh Circuit has dictated the type of evidence employers in an

employment discrimination action must present in order to meet their burden of production. *IMPACT I*, 893 F.2d at 1200. The Eleventh Circuit requires that the employer must offer proof by the person who made the employment decision, or by any other person stating that the employment decision was made on the basis of what he thought demonstrated the best qualified person. *Id.* at 1194. Petitioners are, in the Eleventh Circuit, cloaked with the burden of persuasion that was rejected in *Burdine*, 450 U.S. at 256-57, 101 S. Ct. 1097 and in *St. Mary's*, 509 U.S. at 509, 113 S. Ct. at 2748 ("By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners [defendants] sustained their burden of production").

The employer should never be required to persuade the court that it had convincing objective reasons for preferring the chosen applicant above the plaintiff. *See Burdine*, 450 U.S. at 257, 101 S. Ct. at 1096. The Eleventh Circuit has applied the burden of persuasion to the Petitioners, which is improper as recognized by *Burdine*.

Furthermore, the Eleventh Circuit has held that the Petitioners, by not presenting specific testimony by the decision-maker, are in the same position as if they were silent (even though they presented six days of testimony and evidence) when faced with the Plaintiffs' proof. The Eleventh Circuit's reasoning was discredited by this Court in *St. Mary's* where this Court stated that:

> By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a `better position than if they had remained silent.'

509 U.S. at 509, 113 S. Ct. at 2748. Thus, the petition for certiorari should be granted, as an employer that presents evidence that is ultimately rejected by the factfinder should not be placed in the same position as if the employer is silent.

Based upon the decision in *IMPACT I* that the Petitioners did not meet their burden under *Burdine*, the Eleventh Circuit has ordered on remand that the District Court enter judgment for the Plaintiffs if the District Court determines that the Plaintiffs have satisfied their burden of proof in presenting a prima facie case. *IMPACT II*, 158 F.3d at n. 31. In reaching this conclusion, the court held that Petitioners, by not meeting their burden of production, were the same as if they were silent in the face of the presumption created by the prima facie case. *See id.* This result is not warranted under *St. Mary's*, 509 U.S. 502, 113 S. Ct. 2742. In *St. Mary's* this Court held that the fact finder's rejection of an employer's asserted reason for its actions does not entitle the plaintiff to judgment. *See* 509 U.S. at 509-10, 113 S. Ct. at 2748.

Moreover, the Eleventh Circuit's decision misapplies the purpose of the *McDonnell Douglas* prima facie case requirement as a prima facie case satisfying the flexible standards under *McDonnell Douglas* should not guarantee the plaintiff a victory on the ultimate finding of discrimination. Courts of appeal in at least three circuits have noted that evidence, by itself, "required to establish a prima facie case under *McDonnell Douglas* is not invariably sufficient to sustain an ultimate finding of illegal discrimination." *Fisher v. Vassar College,* 114 F.3d 1332, n. 7 (1997) (citing *Equal Employment Opportunity Comm'n, v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir 1997); *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) and *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)). In *Avery*, the Sixth Circuit remarked that the amount of evidence in

the prima facie context is "not the same amount necessary to win a judgment." 104 F.3d at 861. Specifically, the prima facie stage only requires the plaintiff to present facts allowing inferences to be drawn in the plaintiff's favor, which is not the same evidence to establish pretext. *Id.*

The Eleventh Circuit has misconstrued *St. Mary's* and *McDonnell Douglas* by conflating the prima facie burden with the ultimate issue of racially-motived action in this case. Thus, this Court should resolve the conflict created by the *IMPACT II* decision with Supreme Court precedent.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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